

State of New Hampshire  
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095  
(603) 271-3503 FAX (603) 271-2867



R. L. Spencer, Inc.  
222 Highbridge Street  
Fayetteville, NY 13066

Attn: Richard J. Bruno, Jr.

Re: Home Depot Construction  
Tilton, NH

NOTICE OF PROPOSED  
ADMINISTRATIVE FINE  
No. AF 02-005

February 14, 2002

**I. Introduction**

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division ("Division") to R. L. Spencer, Inc. pursuant to RSA 482-A:13 and Env-C 601.05. The Division is proposing that fines totaling \$82,500 be imposed against R. L. Spencer, Inc. for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

**II. Parties**

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. R. L. Spencer, Inc. ("R. L. Spencer") is a New York corporation having a mailing address of 222 Highbridge Street, Fayetteville, NY 13066, Attn: Richard J. Bruno, Jr. The corporate registration is still pending with the NH Secretary of State, Corporate Division.

**III. Summary of Facts and Law Supporting Claim(s)**

1. Pursuant to RSA 482-A, the Department of Environmental Services ("DES") regulates dredging, filling, and construction in or on any bank, flat, marsh, wetland or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES ("Commissioner") has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. Pursuant to RSA 485-A:17, DES regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, the Commissioner has adopted Env-Ws 415 to implement this program.
4. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of, *inter alia*, RSA 485-A:17, Env-Ws 415, or any permit

issued pursuant thereto. Pursuant to RSA 485-A:22, V, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.

5. Pursuant to RSA 485-A:13 and related sections, DES regulates the discharge of pollutants to surface waters through a permit program. As part of this program, the Commissioner has adopted Env-Ws 401 - 405 relating to permits and has adopted Env-Ws 1700 to establish water quality standards for the State's waters.

6. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations relating to the discharge of pollutants to surface waters and the water quality standards. Pursuant to this section, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.

7. Home Depot USA, Inc. ("Home Depot") is a corporation registered to do business in New Hampshire having a mailing address of 5 Dan Road, Canton, MA 02021.

8. Tilton Mac-Cal, LLC ("Tilton Mac-Cal") is a New Hampshire corporation having a mailing address of 33 Congress Street, Braintree, MA 02184.

9. Tilton Commercial Realty, LLC ("Tilton Commercial Realty") is a New Hampshire corporation owned by Mr. Robert MacPherson and having a mailing address of 67 Spinnaker Street, Portsmouth, NH 03801.

10. Tamchar is a New Hampshire corporation having a mailing address of 156 Eaton Hill Rd. PO Box 266, Auburn, NH 03032.

11. Home Depot, Tilton Mac-Cal, Tilton Commercial Realty, R. L. Spencer, and Tamchar are hereinafter collectively referred to as "the Responsible Parties".

12. On June 23, 2000, the Division received an application from Tilton Mac-Cal to construct a 132,000 sq. ft. Home Depot store off of US Route 3/ NH Route 11 in Tilton, NH (the "Project") on Lots 10, 11, 11A, 12 and 19 of Tilton Tax Map 20 (the "Property"). The application requested approval to dredge and fill of 100 sq. ft. of drainage swale in order to reconstruct a 30 x 40 ft culvert and to fill 69,470 sq ft of forested wetland to construct access and parking.

13. On November 14, 2000, the Division received plans and a draft copy of easement language for the proposed conservation easement that Tilton Mac-Cal agreed to provide as mitigation for the proposed wetlands impacts. The easement was to be made up of two lots, proposed Lot 1 (approx. 1.65 acres) and proposed Lot 4 (approx. 18.35 acres).

14. On December 13, 2000, the Division issued wetlands permit No. 2000-01321 under RSA 482-A ("Wetlands Permit") to Tilton Mac-Cal for work associated with the Project.

15. On December 14, 2000, the Division sent the Wetlands Permit to Tilton Mac-Cal as an enclosure to the letter of approval, which included the following relevant findings and served as the basis for the issuance of the Wetlands Permit:

- a. This project is classified as a major project per Rule Wt 303.02(c), projects which alter more than 20,000 sq. ft. of wetlands.

- b. The applicant has agreed to place 19.99 acres into conservation easement to offset the impacts of the proposed project.
  - c. The proposed easement will protect 15.56 acres of commercially zoned uplands adjacent to wetlands, with a ratio of 9.7:1 for protected uplands to impacted wetlands.
  - d. The proposed erosion controls, detention basins, grass treatment swales, flood plain mitigation areas, culvert sizing and inverts will protect the wetlands ability to retain floodwaters and silt.
  - e. The project as approved, if constructed in adherence to the provided construction sequence, erosion controls, surface run-off detention and treatment system, should offset any impact from increased runoff of the development.
  - f. The site of this proposed project was inspected on April 12, 2000 by representatives from [DES], US Fish & Wildlife, the US Army Corps of Engineers staff and the EPA.
  - g. The project as approved and as conditioned has met the intent of Rule Wt 302.03, Avoidance and Minimization.
16. On January 18, 2001, the Division issued Alteration of Terrain/Site Specific Permit #WPS-5786 ("Site Specific Permit") under RSA 485-A:17 to Tilton Mac-Cal to construct a 118,114 square foot building supply retail store, disturbing 17.1 acres of land. Condition # 4 of the Site Specific Permit provided that approved plans and supporting documentation in the project file are part of the permit.
17. Lot 11A, as included in the Wetlands Permit, is now part of Lot 11. On February 27, 2001, Lot 10 was transferred from the Town of Tilton to Tilton Commercial Realty, Lot 11 was transferred from Ms. Christina MacCarthy to Home Depot, and Lots 12 and 19 were transferred from Ms. MacCarthy to Tilton Mac-Cal. These transfers were recorded at the Belknap County Registry of Deeds on March 1, 2001.
18. Tilton Mac-Cal, Tilton Commercial Realty, and Home Depot (collectively, the "Property Owners") own and are responsible for the development of the Property. The Property Owners are all deemed to be permit holders under Wetlands Permit.
19. R. L. Spencer is the general contractor for Home Depot for the Project. Anthony Strazzella is the Project manager for R. L. Spencer.
20. Tamchar is the subcontractor for R. L. Spencer, responsible for the site work on the Property. Charles Therriault is the Project manager for Tamchar.
21. R. L. Spencer and Tamchar were retained by the Property Owners to develop the Property in accordance with the Wetlands Permit and the Site Specific Permit.
22. Condition #1 of the Wetlands Permit requires work to be done in accordance with plans by Vanasse Hangen Brustlin, Inc. ("VHB") dated June 9, 2000, received by the Division on June 23, 2000 ("Plans"). The Plans detail the sequence of construction and the measures to be taken for erosion and sediment control. Relevant provisions of the Plans include:

- a. Item A in the Construction Sequence (sheet C-2 of the Plans), which requires the installation of silt fencing and hay bales prior to the start of construction and the maintenance of them until final pavement surfacing and landscaping is established.
  - b. Item B in the Construction Sequence (sheet C-2), which requires the construction and stabilization of drainage swales and stormwater management basins prior to the stripping of wetland soils, site grading, or the construction of the building.
  - c. Site plans that show areas of wetlands impact, the location of silt fencing, and the location of drainage swales and basins (sheets C-4, C-5, and C-9).
  - d. Item 5 of the Erosion and Sediment Control Plan (sheet C-2), which requires erosion control measures to be inspected every week and during and after every rain event and any necessary replacement or repair to be performed promptly by the contractor.
  - e. Item 6 of the Erosion and Sediment Control Plan (sheet C-2), which requires the treatment swales and detention basins to be stabilized with vegetation prior to directing runoff through the drainage system.
23. Condition #5 of the Wetlands Permit states: "Orange construction fencing shall be placed at the limits of the site to prevent accidental encroachment into the wetlands and the protected easement area."
24. Condition #7 of the Wetlands Permit states: "This permit is contingent upon the execution of a conservation easement on 19.9 acres as depicted on plans received by the Bureau on November 14, 2000".
25. Condition #8 of the Wetlands Permit states: "The applicant shall record the plan entitled 'Consolidation and Subdivision Plat prepared for: Tilton Mac-Cal LLC,' dated August 24, 2000 with the conservation easement for each appropriate lot within 10 days from receipt of this decision and submit a certified receipt from the Belknap County Registry of Deeds to the DES Wetlands Bureau."
26. Condition #11 of the Wetlands Permit states: "The plan noting the conservation easement with a copy of the final easement language shall be recorded with the Registry of Deeds Office for each appropriate lot. A copy of the recording from the County Registry of Deeds Office shall be submitted to the DES Wetlands Bureau."
27. Condition #13 of the Wetlands Permit states: "The conservation easement area shall be surveyed by a licensed surveyor, and marked by monuments prior to construction."
28. Condition #14 of the Wetlands Permit states " Signs to indicate the location of and restrictions on the area shall be posted every 150 feet along the boundary of the conservation area prior to construction."
29. Condition # 17 of the Wetlands Permit states: "Appropriate siltation, erosion, and turbidity controls shall be in place prior to construction, shall be maintained during construction, and shall remain until the area is stabilized."

30. Condition #18 of the Wetlands Permit states: "Within three days of final grading in an area that is in or adjacent to wetlands or surface waters, all exposed soil areas shall be stabilized by seeding and mulching during the growing season, or if not within the growing season, by mulching with tack or netting and pinning on slopes steeper than 3:1."
31. Condition #22 of the Wetlands Permit states: "The contractor responsible for completion of the work shall utilize techniques described in the DES Best Management Practices for Urban Stormwater Runoff Manual (January, 1996) and the Stormwater Management and Erosion and Sediment Control Handbook for Urban and Developing Areas in New Hampshire (August, 1992)."
32. On May 8, 2001, the Town of Tilton issued its building permit to Home Depot for the construction of the building.
33. The Town of Tilton Code Enforcement officer inspected the Property for compliance with the Town building permit; based on his inspection, it was determined that the Home Depot foundation had been started by July 1, 2001.
34. On July 11, 2001, the DES Wetlands Bureau received an internal referral from the DES Waste Management Division indicating that a forested wetland was being stumped and filled and no permit was visible on site. The photographs submitted with the referral show that extensive site work had taken place, including grading for roads, stockpiling of stumps, rutting and filling of wetlands, and excavation for the foundation, foundation installation and side wall building construction.
35. On August 2, 2001, DES personnel met with the R.L. Spencer Project Manager, Mr. Strazzella, and the Tamchar Project Manager, Mr. Therriault, and inspected the Property and observed the following:
- a. Silt fences were not being maintained and hay bales were not installed as required by the Plans.
  - b. Detention basin 2, adjacent to the access road, was not constructed (Construction Sequence item B, sheet C-2) even though the wetlands soils were stripped (Construction Sequence item D, sheet C-2), the site was graded (Construction Sequence item E, sheet C-2) and the building's frame was constructed (Construction Sequence item F, sheet C-2).
  - c. Approximately 160 linear feet of intermittent stream and associated wetlands located to the west of the access road was regraded in excess of the permitted impacts. The regraded area was not stabilized by seeding or mulching. Sediment (fill) had been deposited along approximately 200 linear feet of stream channel located to the east of the access road.
  - d. Runoff was being directed into detention basin 1 prior to vegetative stabilization of the basin.
  - e. No orange construction fencing was installed to prevent accidental encroachment into the wetlands and the protected easement area.

- f. No monuments were installed on the conservation easement boundary.
- g. No signs were posted along the conservation easement area boundary.
- h. Disturbed areas were not mulched and seeded as required.
- i. Failure to maintain silt fences had resulted in the deposition of fill in jurisdictional areas that should not have been impacted.
- j. The area adjacent to the disturbed wetland (which has a slope of greater than 3:1) was only partially stabilized with riprap and was not stabilized by seed, mulch, tack or netting.

36. Photographs and site notes were taken to document the field inspection.

37. Based on the field observations, Division personnel requested Mr. Strazzella and Mr. Therriault to complete the following items by August 8, 2001:

- a. Install orange construction fencing around the wetlands and along the boundary of the conservation easement.
- b. Trench in the silt fencing and reinforce it with hay bales where necessary.
- c. Remove the sediment (fill) deposited in the stream with hand tools.
- d. Erect monuments and signs denoting the boundary of the conservation easement.
- e. Engage wetlands scientist or the original project engineer to look at the disturbed wetland area adjacent to the access road to determine appropriate restoration measures.
- f. Submit photographic documentation of compliance.

38. On August 8, 2001, Division personnel met with Mr. Strazzella and Mr. Therriault to inspect the Property and observed the following:

- a. No drainage swales were constructed.
- b. Only one stormwater detention basin was partially constructed.
- c. Less than 50% of the required orange fencing was installed, and no orange fencing at all was erected around the conservation easement. When initially questioned by Division personnel, Mr. Therriault responded that the fencing was up. He later indicated that they had run out of fencing.
- d. The silt fencing was not properly trenched and sections were knocked over by runoff or sand.
- e. The stormwater detention basins had not been vegetated. Mr. Strazzella and Mr. Therriault indicated that the only water in them was from a spring and that all runoff was being directed towards the interior of the site by berms. The Division's inspection found

that runoff was from a recent rain event. The slopes of the sides of the basins were greater than 3:1 and were not stabilized.

f. No signs or monuments were erected in or around the easement area. Mr. Strazzella said that he thought that Mr. Robert MacPherson of Tilton Mac-Cal was responsible for this.

g. There was slash in the intermittent stream within the easement area. The stream east of the culvert was cleaned with hand tools on August 3, 2001 according to Mr. Therriault. The unstabilized bank was causing sediment (fill) to erode into the stream.

h. The sloped area near the wetland was only partially stabilized with riprap. Mr. Therriault indicated to Division staff that this slope was not 3:1 and therefore he did not feel it was necessary to stabilize the slope.

i. Mr. Therriault and Mr. Strazzella indicated to Division staff that they were not aware of the exact boundary of the conservation easement.

j. A stockpile of fill was located in the southern end of the site adjacent to US Rt.3/NH Rt. 11. This stockpile was higher than the Home Depot building and was not stabilized with silt fencing or mulch. Mr. Strazzella indicated that trucks would come Monday to begin moving the stockpile, but that the process would likely be slow to reduce traffic moving through the site.

k. Mr. Strazzella and Mr. Therriault indicated that they did not know the specific requirements of Wetlands Permit. They said that Mr. MacPherson had the Wetlands Permit.

The Wetlands Permit was not posted at the Property.

39. Division personnel obtained water samples from three locations and analyzed them for turbidity. Laboratory analysis yielded the following results:

- a. 3.9 Nephelometric Turbidity Units (NTUs) for a sample collected 25 feet upstream (west) of the 48"-diameter culvert under the main entrance;
- b. 64 NTUs for a sample collected 15 feet downstream (east) of the 48"-diameter culvert under the main entrance; and
- c. 4.9 NTUs for a sample collected 75 feet downstream (east) of the 48"-diameter culvert under the main entrance, within the conservation easement area.

Photographs and site notes also were taken to document the field inspection.

40. During an August 8, 2001 field inspection, Division personnel hand-delivered a copy of a Notice of Findings dated August 8, 2001 and a copy of the Wetlands Permit to Mr. Strazzella and discussed each of the findings with him and Mr. Therriault. Division personnel requested that all exposed areas, except those that were designated by the plans to be paved soon, be mulched and seeded immediately, unless they were going to be covered with topsoil by Monday,

August 13, 2001. Mr. Therriault and Mr. Strazzella indicated that they would mulch where they felt it was appropriate. During the inspection, Mr. Strazzella affirmed that he had complied with the August 2, 2001 DES request to have a wetlands scientist evaluate the Property and propose a restoration plan for the degraded wetland area east of the access road. Mr. Strazzella said he had scheduled a meeting with Randall Shuey of Gove Environmental Services ("GES") for Tuesday, August 14, 2001.

41. The Division received photos from Mr. Strazzella on August 8, 2001. The photos showed only places on the Property where it was in compliance. The photos were not representative of the entire Property.

42. On August 9, 2001, the Division received a Memorandum via fax from Mr. Shuey indicating that GES had been contacted by R. L. Spencer to assist them in addressing the letter of findings dated August 8, 2001. Enclosed was a preliminary outline of GES's schedule for compliance. The schedule provided that on August 15, 2001 the conservation easement boundary would be set and that on August 20, 2001 all exposed slopes would be mulched and seeded and that on August 30, 2001 the second basin was to be completed.

43. On August 17, 2001, DES issued Administrative Order WD 01-31 ("Order") to the Responsible Parties.

44. Item E.1. of the Order required the Responsible Parties to "Immediately cease all construction activities on the Property except as specifically authorized by this Order."

45. Item E. 2. of the Tilton Order required the Responsible Parties to construct the drainage swales and stormwater management basins within two weeks of the Order.

46. Item E. 8. of the Tilton Order required the Responsible Parties to have the conservation easement boundary surveyed and marked with surveyed monuments by August 21, 2001.

47. On August 22, 2001, Division personnel inspected the Property and found the following:

- a. Some of the silt fence adjacent to the disturbed wetlands was improperly installed or maintained. The silt fencing was repaired immediately upon request. Silt fencing behind the Home Depot building was not trenched in.
- b. The conservation easement boundary was not survey located, but paper signs had been erected.
- c. Some side slopes adjacent to the remaining wetland and conservation area were graded but not stabilized.
- d. One basin was under construction by Tamchar, but the side slopes were not stabilized and the basin contained turbid water.
- e. The second basin had not yet been started.

The large loam pile adjacent to Route 3 was being excavated for removal.



48. On August 22, 2001, the Division received the executed conservation easement from Home Depot.

49. On August 22, 2001, Division personnel met with agents for the Responsible Parties. During this meeting, Home Depot agents stated that the basins would be completed by September 7, 2001. The Division agreed to allow construction work to take place inside the building only.

50. On September 13, 2001, Division personnel inspected the Property and observed the following:

- a. The first basin was constructed and side slopes were beginning to become vegetated.
- b. The second basin was under construction, the side slopes on one end were not completed and only half of the side slopes were hydroseeded and covered with erosion control blankets.
- c. One conservation easement monument was in place.
- d. In some areas, the erosion control blankets were not properly keyed in at the top of the slopes. In other areas, the erosion control blankets contained gaps adjacent to landscape plantings.
- e. In some areas, erosion control gullies were observed below the erosion control blankets.
- f. New work outside the building had taken place since the August 22, 2001 inspection, including:
  - (1) Grading a loam pile under the proposed uncovered "Garden Center";
  - (2) Installation of steel columns for construction of the Garden Center;
  - (3) Stockpiling gravel on the main part of the parking areas;
  - (4) The transformer pad had been constructed; and
  - (5) Erection of the outer block vestibule had been started.
- g. The transformer was being installed during the inspection.
- h. An area behind the building was being excavated.

51. During the September 13, 2001 inspection, Division personnel asked Mr. Therriault why the new work had been done outside the building. He indicated that the gravel piles had been placed since the Order because he needed to make room at his storage facility for the soil from the large loam pile adjacent to Route 3 and he said he had no other location to place the gravel.

52. On September 14, 2001, DES issued an Amendment to the Order which allowed construction activity to proceed as permitted, except paving of parking lots and roadways.

53. On or about September 27, 2001, the Division received a report from GES stating that "It is our opinion that the basins are now stabilized. The vegetation is quickly growing on the slopes

and the erosion control blankets will continue to assist in stabilization of the slopes and basins at least through next spring.”

54. A letter from Richard D. Bartlett and Associates to GES dated October 2, 2001 (received October 11, 2001) stated that Richard D. Bartlett and Associates had completed setting the boundary monuments on the lot 4 conservation easement of the Property.

55. RSA 482-A:3, I states in part “[n]o person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]”.

56. RSA 482-A:12 requires the applicant to post a copy of the issued permit “in a secured manner in a prominent place at the site of the approved project.”

57. RSA 485-A:13 states that it shall be unlawful for any person or persons to discharge or dispose of any sewage or waste to the surface or groundwater of the state without first obtaining a permit from DES.

58. Sediment-laden water constitutes waste as defined under RSA 485-A

59. Env-Ws 1703.11(b) states that the turbidity in Class B waters shall not exceed naturally occurring conditions by more than 10 NTUs.

60. Env-C 614.05(a)(1) defines a class IV Violation of RSA 482-A, for which the specified fine is \$2,000, as including unauthorized dredge that involves a total impact of 20,000 square feet or more in a swamp, provided it exceeds the criteria for a class III violation.

61. Env-C 614.05(b)(1) defines a class IV Violation of RSA 482-A, for which the specified fine is \$2,000, as including unauthorized fill that involves a total impact of 20,000 square feet or more in a swamp, provided it exceeds the criteria for a class III violation.

62. Env-C 614.05(m) defines a Class IV Violation of RSA 482-A, for which the specified fine is \$2,000, as including “[f]ailing to comply with notification, filing or other specific permit conditions that do not fall into any of the above-listed criteria.”

63. Env-C 614.07(a) defines Violations Relating to Posting, Signing, and Recording Permits, for which the specified fine is \$500 per violation, as failing to post a permit as required by RSA 482-A:12.

64. Env-C 614.06 defines Extraordinary Violations of RSA 482-A, for which the specified fine is \$2,000 per violation, as including the following: (b) Committing repeated violations on the same or different property or project; (f) Failing to comply with permit conditions or other requirements, which taken cumulatively constitute a complete disregard of applicable requirements, proper construction techniques, or best management practices.

65. Env-C 614.08 defines Multiple Violations of RSA 482-A, for which the specified fine is \$2,000 per day as including: (c) Unauthorized work carried out over a period of time, where each day’s unauthorized work shall be a separate violation, and (d) Unauthorized work constituting violations of separate conditions of a permit, order, or approval.

#### IV. Violations Alleged & Proposed Fines

1. R. L. Spencer has violated Condition #1 of the Wetlands Permit by not performing all work in accordance with the Plans. These violations specifically include:

- a. Construction sequencing was not adhered to;
  - b. Temporary erosion control measures were not maintained and not installed to the full extent of the Plans;
  - c. The detention basins were not constructed as shown on the Plans (sheet C-9);
  - d. There was an impact to additional wetland areas not authorized by the approved plan.
- Seeding/mulching was not used to stabilize exposed areas

These violations constitute class IV violations pursuant to Env-C 614.05(a) and (m), which authorize a fine of \$2,000 for each violation. For these five violations, the Division is seeking a fine of \$10,000.

2. R. L. Spencer violated conditions 5, 17, and 22 of the Wetlands Permit, as follows:

- a. R. L. Spencer failed to install orange construction fencing as required by condition #5 until 47 days after construction had begun.
- b. R. L. Spencer failed to install appropriate siltation or erosion control devices as required by condition # 17 until at least 40 days after construction had begun.
- c. R. L. Spencer failed to follow the techniques described in the DES Best Management Practices for Urban Stormwater Runoff Manual (January, 1996) and the Stormwater Management and Erosion and Sediment Control Handbook for Urban and Developing Areas in New Hampshire (August, 1992) as required by condition # 22.

These violations constitute class IV violations, for which Env-C 614.05(l) and (m) authorizes a fine of \$2,000 per violation. For these three violations, the Division is seeking a fine of \$6,000.

3. R. L. Spencer violated RSA 482-A:12 by failing to post the Wetlands Permit. For this violation, the Division is seeking a fine of \$500 pursuant to Env-C 614.07(a).

4. R. L. Spencer has violated the Order by undertaking work outside the building, including:

- a. Deposition of gravel loam in the parking lot;
- b. Grading of loam under the proposed uncovered "Garden Center"
- c. Installation of steel columns adjacent to the "Garden Center"
- d. Erection of part of the exterior of one vestibule.

- e. Installation of the transformer pad.

Pursuant to Env-C 614.06(e), the Division is seeking a fine of \$10,000 for these five violations.

5. R. L. Spencer has violated the Order by failing to complete the sedimentation basin construction by August 31, 2001. Pursuant to Env 614.08(c), for each days work done in violation of the Order at \$2,000 per day, for 27 days, a \$54,000 fine is authorized.

6. R.L. Spencer violated RSA 485-A:8 and RSA 485-A:13 on August 8, 2001 by discharging waste into an unnamed stream resulting in turbidity violations without a permit from DES. For this violation, the Division is seeking a fine of \$2,000 pursuant to Env-C 603.08(c).

The total fine being sought against R.L. Spencer is \$82,500.

### V. Required Response, Opportunity for Hearing

Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than March 22, 2002 using the enclosed (colored) form.

1. If R. L. Spencer would like to have a hearing, please sign the appearance section of the colored form and return it to James Ballentine, DES Enforcement Paralegal, as noted on the form. A Notice of Scheduled Hearing will be issued.

2. If R. L. Spencer chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it with payment of the fine to Mr. Ballentine.

3. If R. L. Spencer wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to Mr. Ballentine and call Mr. Ballentine to indicate R. L. Spencer's interest in settling.

R. L. Spencer is not required to be represented by an attorney. If R. L. Spencer chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

### VI. Determination of Liability for Administrative Fines

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that R. L. Spencer committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that R. L. Spencer committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that R. L. Spencer proves, by a preponderance of the evidence**, applies in this case:


1. The violation was a one-time or non-continuing violation, **and R. L. Spencer did not know about the requirement when the violation occurred, and the violation has not continued or reoccurred as of the time of the hearing, and any environmental harm or threat of harm has been corrected, and R. L. Spencer did not benefit financially, whether directly or indirectly, from the violation.**
2. At the time the violation was committed, R. L. Spencer was making a good faith effort to comply with the requirement that was violated.
3. R. L. Spencer has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to R. L. Spencer's case which was not known to the Division at the time the fine was proposed.

**\*\*\*\*\*IMPORTANT NOTICE\*\*\*\*\***

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that R. L. Spencer committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is R. L. Spencer's opportunity to present testimony and evidence that R. L. Spencer did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If R. L. Spencer has any evidence, such as photographs, business records or other documents, that R. L. Spencer believes show that R. L. Spencer did not commit the violation(s) or that otherwise support R. L. Spencer's position, R. L. Spencer should bring the evidence to the hearing. R. L. Spencer may also bring witnesses (other people) to the hearing to testify on R. L. Spencer's behalf.

If R. L. Spencer wishes to have an informal meeting to discuss the issues, R. L. Spencer must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page ([www.state.nh.us.des](http://www.state.nh.us.des)). If R. L. Spencer has any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

  
**COPY**  
Harry T. Stewart, P.E., Director  
Water Division

Certified Mail/RRR #7000 0600 0023 9936 2786

Enclosure (*NHDES Fact Sheet #CO-2001*)

cc: Gretchen Rule, DES Legal Unit  
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~~R. L. Spencer, Inc.~~ Home Depot USA, Inc.  
Gove Environmental Services, Inc.